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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Defendant and Appellant,

v.

LLOYD EDWARD SMITH,

Plaintiff and Respondent.

E053494

(Super.Ct.No. SWF029545)

OPINION

APPEAL from the Superior Court of Riverside County. Larrie R. Brainard, Judge.  
(Retired judge of the San Diego Super. Ct., assigned by the Chief Justice pursuant to art.  
VI, § 6, of the Cal. Const.) Affirmed in part; reversed in part with directions.

Paul Stubb, Jr., under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, James D. Dutton, and Emily R.  
Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION

Defendant Lloyd Edward Smith appeals from judgment entered following jury convictions for driving under the influence (DUI) of alcohol (Veh. Code, § 23152, subd. (a)<sup>1</sup>; count 1), driving with a blood alcohol concentration of .08 percent or more (§ 23152, subd. (b); count 2), and driving on a suspended license (§ 14601.1, subd. (a); count 3). The jury also found true the allegation that defendant's blood alcohol concentration was 0.15 percent or more (§ 23578). Defendant admitted he suffered a prison prior (Pen. Code, § 667.5, subd. (b)). The trial court sentenced defendant to three years in prison, including two years for count 1, and one year for the prison prior enhancement. The court imposed a concurrent, stayed two-year term on count 2, and imposed a five-day jail term for count 3, which the trial court deemed served.

Defendant contends there was insufficient evidence to support his conviction for driving with a suspended license (count 3). He also argues the trial court abused its discretion in admitting evidence of a prior DUI. We reverse defendant's conviction on count 3, on the ground defendant's license was suspended based on a DUI conviction, and a conviction based on such facts is excluded under section 14601.1. We further conclude allowing evidence of defendant's prior DUI does not constitute prejudicial error. The judgment is reversed as to count 3 and affirmed in all other respects.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Vehicle Code.

## II

### FACTS

On October 15, 2009, at approximately 7:15 a.m., defendant illegally drove his maroon Saturn Vue onto the curb or driveway to pass Michael Lovett's vehicle. Defendant then cut in front of Lovett's vehicle and took off, almost hitting Lovett's vehicle. While following defendant, Lovett observed defendant continue to drive erratically, speeding up to 70 miles per hour, swerving, passing on the shoulder, stopping abruptly at red lights, and speeding away at green lights. Lovett called 911 and remained on the telephone, describing what he observed as Lovett followed defendant. Lovett got a good look at defendant when defendant pulled over to the side of the road and Lovett pulled up alongside, stopping next to defendant. Lovett noticed defendant was a Black male, wearing a black baseball hat. Defendant suddenly began driving again, almost striking Lovett's car. Defendant also almost struck a van, but swerved to avoid a collision.

Defendant turned into an apartment complex. Lovett parked outside the complex. When Sheriff's Deputy John Clark arrived, Lovett pointed out the driveway where defendant had pulled into the apartment complex. Lovett told Clark the Saturn Vue had arrived at the complex "30 seconds" earlier. Clark located the maroon Saturn Vue and found defendant seated in the driver's seat, wearing a black baseball cap. Carl Brinker was seated in the front passenger seat. Brinker told Clark that the Saturn Vue had been parked for over an hour. Clark felt the hood of the Saturn Vue and noticed it was "hot." Brinker appeared intoxicated.

After another deputy arrived, Clark approached defendant, sitting in the driver's seat. Defendant's speech was slurred, he smelled of alcohol, and he had ashes on his shirt. When asked to exit the vehicle, defendant could barely walk. Upon running a driver's license check, Clark discovered defendant's license was suspended. At the scene, Lovett identified defendant as the driver of the Saturn Vue. Clark arrested defendant for driving under the influence of alcohol and drugs. Defendant's test results showed he had a blood alcohol concentration (BAC) of 0.20 percent and had recently ingested enough marijuana to render him impaired.

Dennis Myers, a Department of Motor Vehicles (DMV) supervisor, testified that defendant's DMV records disclosed that defendant did not have a valid driver's license on October 15, 2009. Additionally, defendant's license had been suspended in 2001 for driving under the influence of alcohol or drugs, and had never been reinstated. Defendant signed a document acknowledging his suspension. Defendant was also sent two letters of suspension by certified mail.

During a photographic lineup about a year and a half after the incident, Lovett thought he would have difficulty identifying defendant. Lovett was surprised that, when he was shown the photographs, he was able to identify defendant immediately. Lovett also identified defendant from a photographic lineup during the trial.

Defendant's friend, Beverin Howard, testified that, during the evening of defendant's arrest, defendant, Howard, and Brinker were "hanging out" at Howard's apartment. After midnight, Howard and Brinker left and took Brinker's car to visit Howard's cousin, while defendant remained in Howard's apartment. Howard drove

because Brinker's license was suspended. Howard claimed he was wearing a black baseball cap similar to defendant's. A little while later, Howard and Brinker returned to Howard's apartment. Howard took the car keys and went inside, while Brinker remained in the car. Howard claimed he did not see what occurred outside his apartment after he went inside.

Brinker testified that five or 10 minutes after Howard left the car and went inside, defendant came outside to visit with Brinker, who was sitting in the front passenger seat. Defendant sat in the driver's seat, where he was when a deputy arrived 10 minutes later. The deputy asked Brinker for identification. Brinker refused to provide it. The deputy drew his weapon and ordered Brinker out of the car. Brinker complied. The deputy pushed Brinker against the car and to the ground. Another deputy removed defendant from the car. Lovett was brought to the scene. A deputy put a hat on defendant. Then Lovett identified him as the driver.

Brinker admitted at trial that he had lied to an officer regarding his identity and had pled guilty to misdemeanor prostitution in 2003. Howard admitted he had been convicted of providing a police officer with false identification in 1997, and was convicted of possession and transportation of cocaine in 2003.

During rebuttal, Clark testified that he never pulled his gun on Brinker. He only would have drawn his gun if he felt in imminent danger or had seen Brinker carrying a weapon. Clark did not feel in any danger and neither defendant nor Brinker were armed. Neither defendant nor Brinker told Clark that Howard was the driver, or even mentioned Howard. When law enforcement had the car towed, the keys were not in the ignition.

III  
SUFFICIENCY OF EVIDENCE OF SUSPENDED  
LICENSE CONVICTION

Defendant contends there was insufficient evidence supporting his conviction for driving with a suspended license under section 14601.1, subdivision (a) (count 3).

The prosecution originally charged defendant with violating section 14601.2, which prohibits driving with a license suspended because of a DUI conviction. (§ 14601.2, subd. (a).) At the preliminary hearing, the trial court found there was insufficient evidence to support the charge. The prosecution filed an information adding the charge of violating section 14601.1, subdivision (a), in place of the section 14601.2 charge.

Section 14601.1, subdivision (a), prohibits driving with a license which is “suspended or revoked for any reason other than those listed in Section 14601, 14601.2, or 14601.5, if the person so driving has knowledge of the suspension or revocation.” (§ 14601.1, subd. (a).) Under section 14601.1, subd. (a), “Knowledge shall be conclusively presumed if mailed notice has been given by the department to the person pursuant to Section 13106. The presumption established by this subdivision is a presumption affecting the burden of proof.” (§ 14601.1, subd. (a).)

Near the end of the trial, the trial court noted to counsel that it had come to the court’s attention that, although the evidence presented as to count 3 supported a section 14601.2 offense, the information alleged a section 14601.1 violation, which was the charge the jury would decide. The trial court added that evidence had been presented that

defendant's driver's license was suspended because of a prior DUI in 2001. The defense requested the trial court to instruct the jury to disregard the evidence of the prior DUI. Defense counsel asserted that it was too late for the prosecution to amend the information and therefore count 3 must remain a section 14601.1, subd. (a) violation. In turn, the jury should be told not to consider the prior DUI evidence, which was highly prejudicial and should have been excluded.

The prosecutor responded that the prior DUI was part of the DMV packet, which was a certified document. It therefore would have been inappropriate to redact it in any way, particularly since the reason for license suspension is relevant to section 14061.1 and section 14061.2 charges. The evidence also showed that defendant's license had not been reinstated. Therefore admonishing the jury was unnecessary because the evidence was admissible and not prejudicial, regardless of whether the charge was a section 14601.1 or section 14601.2 charge. The trial court denied the defense's request for a jury admonition but noted that the prosecution must not argue the evidence showed defendant's propensity for drinking and driving.

The trial court instructed the jury on the count 3, section 14601.1 offense by giving CALCRIM No. 2220, as follows: "The defendant is charged in Count 3 with driving while his driving privilege was suspended or revoked in violation of Vehicle Code Section 14601.1. To prove that the defendant is guilty of this crime, the People must prove that: Number one, the defendant drove a motor vehicle while his driving privilege was suspended or revoked; and, number two, when the defendant drove, he knew that his driving privilege was suspended or revoked.

“If the People prove that the California Department of Motor Vehicles mailed a notice to the defendant telling him that his driving privilege had been suspended or revoked; and, number two, the notice was sent to the most recent address reported to the department or any more recent addresses reported by the person, a court or law enforcement agency, and; number three, the notice was not returned to the department as undeliverable or unclaimed, then you may but are not required to conclude that the defendant knew that his driving privilege was suspended or revoked.

“If the People proved beyond a reasonable doubt that a court informed the defendant that his privilege – his driving privilege had been suspended or revoked, you may but are not required to conclude that the defendant knew that his driving privilege was suspended or revoked.”

Defendant asserts that he could not be convicted of violating section 14601.1 because his license was suspended based on a DUI conviction, and the court failed to instruct the jury of this fact. Defendant also argues he could not alternatively be convicted of violating section 14601.2 because the offense was not alleged in the information. We agree as to both contentions.

Section 14601.1 precludes a conviction under section 14601.1 when the defendant’s license is suspended for driving under the influence of alcohol or drugs. Section 14601.1 prohibits driving with a suspended license “for any reason other than



those listed in Section 14601<sup>[2]</sup>, 14601.2<sup>[3]</sup>, or 14601.5<sup>[4]</sup>.” (§ 14601.1, subd. (a).)

Section 14601.2, prohibits driving with a suspended license for driving under the influence of alcohol or drugs.

It appears that defendant should have been charged with violating section 14601.2, not section 14601.1. Unfortunately, at the preliminary hearing, the trial court dismissed that charge and the prosecution replaced the charge with the section 14601.1 charge, which is inapplicable because defendant’s license was suspended based on a DUI offense. We therefore reverse defendant’s section 14601.1 conviction.

#### IV

#### EVIDENCE OF PRIOR DUI

Defendant contends the trial court abused its discretion in allowing prejudicial, inadmissible evidence of defendant’s prior DUI conviction.

Defendant moved in limine to bifurcate trial of his prior conviction enhancements from the felony charges. The priors included a DUI conviction in 2001. The trial court granted the motion. The trial court next considered the admissibility of evidence of defendant’s prior offenses for purposes of impeachment. The court tentatively ruled that the prosecution could use for impeachment purposes, evidence of the prior domestic

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<sup>2</sup> Driving with suspended license because of reckless driving, lapses in consciousness, negligent or incompetent operation of a motor vehicle.

<sup>3</sup> Driving with suspended license because of driving under the influence of drugs or alcohol.

<sup>4</sup> Driving with suspended license because of failure to submit to an officer requested test when suspected of DUI.

violence offense and possession of stolen property offense, but could not use evidence of defendant's prior DUI conviction because of the nature of the current charges. The court later added that it would not allow evidence of prior conduct under Evidence Code section 1101, other than for purposes of impeachment if defendant testified.

During the trial, DMV Supervisor Myers testified that, based on his review of defendant's DMV records, defendant's driver's license was suspended because of a DUI conviction. Near the end of the trial, defense counsel requested the trial court to instruct the jury to disregard the evidence that defendant's driver's license was suspended because of a DUI conviction. The trial court denied the request. The court later elaborated that defendant's request was denied because the defense was that defendant was not the driver. Defendant was not denying use of drugs or alcohol. Additionally, the prior DUI conviction was almost 10 years old and was mentioned only once. Also, since defendant did not testify, his credibility was not at issue. The trial court therefore concluded the DUI evidence was not so prejudicial as to require an admonition.

Claims of error in admitting evidence are reviewed under the abuse of discretion standard. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Ibid.*)

As defendant argues, under Evidence Code section 1101, subdivision (a), "evidence the defendant has committed crimes other than those for which he is on trial is inadmissible to prove bad character, predisposition to criminality, or the defendant's

conduct on a specific occasion. [Citation.] However, Evidence Code section 1101, subdivision (b), permits evidence of a defendant's past criminal acts when relevant to prove a material fact at issue, such as identity, motive, or knowledge. [Citations.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 607 [Fourth Dist., Div. Two].)

Here, the evidence should have been excluded because a section 14601.1 charge could not be based on a DUI offense. The evidence further constituted prejudicial propensity evidence as to the charges of driving under the influence of alcohol (§ 23152, subd. (a); count 1), and driving with a blood alcohol concentration of .08 percent or more (§ 23152, subd. (b); count 2).

But even assuming the trial court erred in admitting the prior DUI evidence, it is not reasonably probable that the jury would have reached a result more favorable to defendant, had the challenged evidence been excluded. (*People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence that defendant's license was suspended because of a prior DUI conviction was highly beneficial to defendant in that it provided a defense to the section 14601.1 charge. As discussed in the preceding section, defendant could not be convicted of violating section 14601.1 if his driver's license was suspended based on a DUI conviction. Defendant thus benefited from the evidence.

Furthermore, the evidence was not unduly prejudicial because it was mentioned only once, it was not relied on to show propensity, the prior DUI occurred almost 10 years before the charged DUI offenses, and there was substantial evidence that defendant was intoxicated at the time of the charged offense. Defendant's defense as to all three

charged offenses did not turn on whether he was under the influence of drugs or alcohol. Rather, defendant simply argued he was not the driver of the car.

Defendant argues admission of the DUI evidence risked the jury finding defendant was the driver because he had previously been convicted of a DUI. But the defense was based on evidence defendant and Howard had changed places in the driver's seat, and by the time law enforcement arrived, Howard had gone inside the apartment. The defense turned on whether the jury believed defendant's friends' testimony or Lovitt's testimony as to whether defendant was the driver. The verdict reflects that the jury believed Lovitt's testimony. It is not likely the jury would have found the defense compelling and rendered a more favorable verdict, had the prior DUI evidence not been admitted. We therefore conclude any error in allowing the evidence constituted harmless, if not beneficial, error.

## V

### DISPOSITION

The judgment is reversed as to count 3 (driving with a suspended license under section 14601.1, subd. (a)), because defendant's license was suspended based on a DUI conviction. Therefore section 14601.1 was inapplicable. The convictions and sentences are affirmed as to all other counts. We direct the clerk of the Superior Court of Riverside County to correct the abstract of judgment to reflect that the conviction

and sentence for count 3 is reversed, and to forward a corrected copy of the abstract to the Department of Corrections and Rehabilitation.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

RICHLI  
J.